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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

**UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,**
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

OPPOSITION IN BEHALF OF WALTER M. ALLEN TO THE PETITION FOR A WRIT OF CERTIORARI.

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May It Please the Court:

Applicants, Union Barge Line Corporation, Dravo Corporation and Aetna Casualty and Surety Company, petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Petitioners' reference to the opinions of the Court below and statement as to the jurisdiction of this Honorable Court are correctly stated on Page 2 of the petition.

QUESTION PRESENTED

The question stated by applicants to be presented by the petition for certiorari is somewhat different from the question presented to the Honorable, the United States Court of Appeals for the Fifth Circuit. The question as stated in the petition is:

> "Whether or not a land based shipyard worker * * * was engaged in work traditionally performed by a crewmember *on a vessel in navigation* so as to entitle the injured worker to invoke the doctrine of unseaworthiness."
>
> (Italics Counsel's)

For the reasons hereinafter stated, it is respectfully submitted that the question of whether or not the M/V MARINER was a vessel in navigation is not properly before this Court on the application for certiorari.

STATEMENT OF THE CASE

The evidence shows that the M/V MARINER was in the Dravo shipyard in Baton Rouge, Louisiana, for repairs. These repairs are referred to as "extensive" on Page 3 of the petition for certiorari. The nature of these repairs is a factual issue in the case, resolved adversely to petitioners by the Lower Court. The soundness of the Lower Court's decision as to this factual matter will be further documented herein.

Further, in petitioners' statement of the case they say:

> "At no time during the course of the work performed by Dravo on the MARINER was any crew member of the vessel required or permitted to perform any duties in connection with the repairs being accomplished by Dravo.
>
> "*The entire reach of the area in which the scaffold was erected was and had been in the exclusive con-*

trol and custody of Dravo since the commencement of the repair work."

(Italics Counsel's)

Again, it is submitted that the degree of control exercised by the vessel owner, Union, at the time of the repairs in question is a factual matter, likewise resolved adversely to petitioners by the Trial Judge. Similarly, the bases for such resolution will be more adequately discussed in argument.

With the above exceptions as to the "Question Presented" and the "Statement of the Case" as contained in the petition for certiorari, respondent agrees that these portions of the petition are substantially correct.

ARGUMENT

On Page 5 of their petition applicants chastise the Trial Judge for finding as a fact that the repairs being performed on the M/V MARINER "constituted normal routine maintenance." For the Fifth Circuit to affirm such a finding of fact, petitioners state that Court has "so far sanctioned such a departure from the usual course of judicial proceedings by a lower court as to call for an exercise of the Supreme Court's power of supervision."[1] It is respectfully submitted that a mere reference to the record, yea, the testimony of Union's own witness, completely destroys the basis for any such assertion by petitioners. The Court is respectfully referred to the testimony of Union's witness, Mr. Davis (Tr. 368-369), as follows:

"Q. That is a routine operation, is it not, sir?

"A. That is done periodically, yes, sir. That is done occasionally."

* * * * *

[1] See petition for certiorari, p. 5.

"Q. Were there any structural changes made in the hull?

"A. No, sir."

* * * * *

"Q. *Was this routine maintenance operation?*

"A. *That we were doing?*

"Q. *Yes, sir.*

"A. *It was routine.*

"Q. And about how often is that done? About annually?

"A. It would be annually or about every two years I would say.

"Q. *But it was a routine maintenance operation, is that correct?*

"A. *Yes, sir.*"

(Italics Counsel's)

Further, on this score applicants *here* argue that the M/V MARINER was withdrawn from navigation. Respondent is prepared to refute this charge; but, as pointed out previously herein under the title of "Question Presented," this should not be a question before this Honorable Court. The only error assigned by Union in its brief in the United States Court of Appeals appears on Page 2 of that brief as follows:

"ASSIGNMENT OF ERROR

"Union Barge Line Corporation has appealed and submits to the Court that the District Judge was in error in concluding that the work being performed by Dravo on the M/V MARINER was that traditionally performed by a seaman and that Union owed a warranty of seaworthiness to Allen. This brief will be devoted only to that legal issue."

Thus it can be seen that the Trial Court's finding of

fact that the M/V MARINER was a vessel in navigation was not questioned by Union in the Fifth Circuit, Union being content to argue that the work being performed by Allen at the moment of injury was not that traditionally performed by seamen. This admission is further emphasized in Union's brief, Page 6, wherein it is stated:

> "*West*[2] involved work on a vessel which was being reactivated for service after having been placed in moth ball fleet. *This case is not really apposite here since it went off on the fact that the vessel had been withdrawn from navigation.* * * * "
>
> (Footnote and Italics Counsel's)

Hence, Union did not contend in the Fifth Circuit that the M/V MARINER had been withdrawn from navigation, as in *West v. United States*, 80 S. Ct. 189, 361 U.S. 118, and in *Roper v. United States*, 82 S. Ct. 5, 368 U.S. 20. It is submitted this Court will not consider points of law not urged in, nor considered by, the Court below. Thus, we have under consideration Union's sole contention, i.e., that Allen was not doing work traditionally performed by a seaman.

The facts do not support Union.

However, respondent will first refute the "dead ship" argument.

The petition for certiorari attempts to place the MARINER in the category of a "dead ship" as was the case in *West v. United States, supra*, and *Roper v. United States, supra*. The fact that the MARINER was in dry-dock at the time of the accident in question is emphasized so many times that the petition reads as the diary of a traveler on the Sahara. Petitioners argue strenuously that

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[2] *West v. United States* (1959), 361 U.S. 118, 80 S. Ct. 189.

the presence of the MARINER in drydock; the fact that cranes had to be used to remove her propellers and shaft; and that these items of the ship's equipment were taken to a machine shop destroy her status as a vessel in navigation and convert her into a "dead ship." This, petitioners contend, removes any hope or possibility that persons engaged in such labors could be performing work "traditionally done by seamen." This argument is made in spite of the following facts which are manifest in the record:

(1) The drydock in question was a floating drydock afloat in the Mississippi River (Tr. 408, testimony of Union's witness, Phillips).

(2) The cranes involved, referred to as gantry cranes, were floating cranes, one of which was on the floating drydock itself and the other of which was on a vessel and never went on land (Tr. 410, testimony of Union's witness, Phillips).

(3) The machine shop was a vessel, to-wit, a converted LST (Tr. 410, testimony of Union's witness, Phillips).

The MARINER, as previously stated, was drydocked for her annual overhaul or routine maintenance; no structural changes were made in her hull; and she had arrived at Dravo at 2:00 A.M. on March 16, 1963, from whence she departed on another voyage at 11:00 A.M. on April 4, 1963, nineteen days later. (Log of the vessel MARINER, Tr. 354). At this point it appears pertinent to inquire whether all of these admittedly maritime activities involving multiple vessels operating upon the Mississippi River deprive the MARINER "of her status as a vessel in navigation" and render the warranty of seaworthiness unavailable to those engaged in these particular tasks for the reason such tasks are not "traditionally performed by seamen."

It is submitted that, traditionally, seamen in days of yore performed any and all tasks necessary to keep their vessel afloat, navigable, and capable of discharging her function as a vessel. More recently, with respect to the particular type of vessels involved here, it is a matter of historical fact that in World War II floating drydocks were transported to the far-flung atolls of the Pacific where Naval vessels of greater tonnage than the MARINER received extensive repairs to their hulls and otherwise, these repairs being performed, in many instances, by the Naval personnel sailing on the vessel.

Union can only contend that Allen's work was not "traditionally" performed by Union's seamen; but the historical fact is that other seamen have "traditionally" performed similar tasks.

With respect to the amount of control exercised by Union at the time of the accident in question, it is submitted the record fails to support the statements contained on Pages 3 and 4 of the petition for certiorari. It is true the full crew was not aboard the MARINER when the accident occurred. However, the engine room crew, the cook, and two additional seamen from the sister ship NAVIGATOR were aboard the vessel at the time of the accident. The testimony of the assistant engineer, Mr. Reese, shows that while in Dravo's yard she was inspected every two hours by a crew member on watch. *In fact, this witness testified that these regular watch tours carried the person making them to the very area where Allen was injured, i.e., the shaft alley* (see testimony of Reese, Tr. 375-377). While this may have not been the full extent of the control exercised by Union over the vessel, it is sufficient to refute the contention that Union had *absolutely no control* over the vessel. This was, undoubtedly, one of the factors considered by the Trial Judge in his finding of fact that the

MARINER was not a "dead ship," but was in navigation.

At the precise moment Allen was injured he had just completed removing a coupling from the ship's intermediate shaft. This task was accomplished with a wrench and a sledge hammer and consisted of first removing a number of bolts with these tools and then lifting the coupling with a come-a-long. The accident occurred after the bolts had been removed and while the men were waiting for a come-a-long to be brought to the site (See Allen testimony, Tr. 310-313).

If the focus is to be upon the *precise* task being performed by Allen at the *moment* of injury, the evidence clearly shows that such task was one traditionally performed by seamen. This is clear from the testimony of Union's witness, Mr. Phillips, as follows:

> "Q. Now, this coupling — could this coupling be taken off of this shaft and inspected and the keys removed from the shaft or from the coupling and then re-installed by the crew of the vessel while the vessel was afloat?
>
> "A. You say could that be done? Why definitely it could have been done. I mean if it had to be done,— if it had to be done I imagine they could do it." (Tr. 405)

Thus it can be seen that Allen, using a maul and a wrench, was injured while doing a task which could just as well have been done by the crew.

However, it is submitted that under the decisions of this Honorable Court, once the *status* of the vessel is determined as being that of a ship in navigation, a detailed inquiry into the precise task being performed by each of the shorebased workers is precluded. The decisions make it clear that once this *status* is determined, all engaged in the

repair operation are entitled to the warranty if the status be that of a ship in navigation, and none are entitled to the warranty if the determination of status is otherwise.

The warranty of seaworthiness arises from the vessel's status as such, and extends to all engaged in her service. *Seas Shipping Co. v. Sieracki*, 328 U.S. 878, 66 S. Ct. 872.

Counsel for Union now denies the MARINER'S status as a ship in navigation, although this was conceded by them in the Fifth Circuit. Looking, then, at the work being performed by Dravo, it is seen to include, in addition to the task in which Allen was engaged, such minutiae as (1) washing down engine room, (2) fabricating a steel grating walkway at the after end of the pilot house, (3) installing grab rails in showers, (4) remove accumulated sludge, etc. (See trial court's Findings of Fact, Tr. 452.)

It cannot be denied that "washing down the engine room" and "removing accumulated sludge" are tasks traditionally done by seamen.

Will this Court say that on a given trip to a shipyard a shorebased worker who removes accumulated sludge or washes down the engine room is entitled to the warranty of seaworthiness, but one who assists in installing new sleeves on the vessel's shafts is not?

It is respectfully submitted that under the clear language of this Honorable Court in prior decisions, Your Honors will not so rule.

This is clear from the decisions in *West v. United States*, 80 S. Ct. 189, 361 U.S. 118, and *Roper v. United States*, 82 S. Ct. 5, 368 U.S. 20. Both of these cases involved ships which this Honorable Court held to be "dead ships."

Simply stated, in both *West* and *Roper* it was held, in effect, that the vessels or structures were not ships at all and extended no warranty of seaworthiness to anyone. However, the Court made clear its reasoning which is applicable here. For example, in *West v. United States*, the vessel, the S. S. Mary Austin, was a World War II liberty ship. To quote the opinion, 80 S. Ct. 189, 192:

> " * * * This undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. *It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results.* We, therefore, do not believe that the Sieracki line of cases is applicable, which obviates any necessity of our discussions of situations where the vessels themselves are not in the status of the Mary Austin. *Here there could be no express or implied warranty of seaworthiness to any person.*"
>
> (Italics Counsel's)

In *Roper v. United States*, 82 S. Ct. 5, 7, this Honorable Court stated:

> "Since we are unwilling to upset the trial court's *factual determination* that the S. S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. *West v. United States, supra; Kissinger v. United States*, D.C. 1959, 176 F. Supp. 828." * * * *
>
> (Italics Counsel's)

It is respectfully submitted that the Footnote 3 in Justice Clark's opinion in the *Roper* case makes it clear that the warranty is coextensive with the ship's *status* as a vessel in navigation. This footnote in this Honorable Court's opinion is as follows:

> "3. The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. E.g., *Union Carbide Corp. v. Goett*, 4 Cir., 1958, 256 F. 2d 449. *Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness.*"
>
> (Italics Counsel's)

Implicit in this footnote is the principle that, *given a ship in navigation, all* engaged in her service are protected by the warranty. This conclusion is fortified by Justice Clark's statement in *West v. United States*, 80 S. Ct. 189, 192:

> "* * * It would appear that the focus should be upon the *status of the ship*, the pattern of the repairs, and the extensive nature of the work contracted to be done, *rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.* The job analysis which the latter would call for would lead to fortuitous results. * * *"
>
> (Italics Counsel's)

It is respectfully submitted that the decision which is determinative of the issues in this case is *Lawlor v. Socony-Vacuum Oil Company* (2d Cir. 1960), 275 F. 2d 599. In that case the vessel was in the yard of Bethlehem Steel Company for the purpose of her annual layup and overhaul. She had entered the yard on June 24 and de-

parted the yard on July 2, *during which interim period she was in drydock for "a few days for the customary repairs to and painting of the bottom, propellers and so on."* (275 F. 2d 599, 601.) Furthermore, "No structural changes in the vessel were to be made, nor did the contract call for anything in the nature of a major or substantial item of change or repair. The total cost of the work was $70,834 and the contract required performance in 14 days." (Ibid.)

In the case at bar, the vessel was in the yard a total of 19 days and was in drydock 7 days. In *Lawlor*, the contract contemplated performance in 14 days, but was actually completed in 9 days.

Counsel will quote at length from *Lawlor* as follows:

> "Thus the critical question in this case is whether or not the fact that the Mobilfuel was moored in navigable waters at the pier of the shipyard during her annual overhaul *gives her a status such that there is no warranty of seaworthiness* and no duty to Lawlor to maintain the vessel and her equipment in a seaworthy condition.
>
> "Before we attempt to ascertain the underlying principle controlling the case and discuss the pertinent authorities, we think one or two observations will simplify the problem. *Thus we cannot see that the case would differ materially as a matter of basic reasoning if the injured man had been one of the crew of the vessel instead of an employee of Bethlehem.* If Lawlor was doing the work traditionally done by seamen, as we have already found to be the case, he is in the same position as a member of the crew. Moreover, we do not think resort to a mere phrase such as 'out of navigation' gets us very far. *Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so*

that she has to be towed to a shipyard for a day or two for repairs before continuing her voyage cannot fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until the repairs have been completed. Such a vessel is unable to move under her own power, she is still in navigable waters, and would seem to be no more 'out of navigation' at the pier of a shipyard than she would be if moored to one of the municipal piers, awaiting tugs to move her to a place where the repairs to her propellers could be promptly made. Thus, if being 'out of navigation' is a material factor, everything depends upon what we mean by 'out of navigation' in the context of the doctrine of unseaworthiness. *If we were pressed to decide whether the Mobilfuel was 'out of navigation' in navigable waters moored at the Bethlehem pier, we would say she was not 'out of navigation.'*"

* * * * *

"As said by Mr. Justice Clark:

> 'It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shorebased workmen are doing on shipboard at the moment of injury.'

* * * * *

"Thus we must grope for some rational basis for deciding this case, as we were required to do in the analogous situation of determining what factors brought a vessel within the intent of the general provisions of the Jones Act, 46 U.S.C.A. § 688. Cf. *Bartholomew v. Universe Tankships, Inc.*, 2 Cir., 1959, 263 F. 2d 437.

"We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision in this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (Lyon v. United States, 2 Cir., 1959, 265 F. 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (Berge, supra), nor a wholly deactivated vessel from the 'moth ball fleet' (West, supra), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul. While Bethlehem controlled the particular area where the scaffolds and ladders were put up and where the work of locating and repairing the leaks in the tank bulkheads was being performed, the shipowner had general control of the vessel and a full crew of officers and men were aboard. Under these circumstances we hold there was a warranty of seaworthiness by the shipowner running in favor of the crew and also in favor of shore-based workers on the vessel performing work customarily done by seamen."

(Italics Counsel's)

It is interesting to note that certiorari was denied in *Lawlor* by this Honorable Court, 363 U.S. 844, 80 S. Ct. 1614.

It, also, is interesting to note that in *Roper v. United States*, 368 U.S. 20, 82 S. Ct. 5, 7, in Footnote 2 this Hon-

able Court specifically stated that the decision in *Lawlor* was not contrary to its holding as follows:

> "* * * *Lawlor v. Socony-Vacuum Oil Co.*, 2 Cir., 1960, 275 F. 2d 599, is not CONTRA. There minor repairs were underway on an active ship with a full crew aboard."

It is respectfully submitted that *West* and *Roper* are readily distinguishable from the case at bar. In fact, in the *Lawlor* case, *supra*, Judge Medina, in discussing West, referred to the opinion of the Third Circuit therein (which this Honorable Court affirmed) and by footnote quoted that decision, which stated:

> "1. 'It is not as though the "Mary Austin" had finished a voyage and was having repair work done before resuming business again.' *West v. United States*, 3 Cir., 1958, 256 F. 2d 671, 673."
>
> (See *Lawlor v. Socony-Vacuum Oil Company*, 275 F. 2d 599, 603.)

It is respectfully submitted:

(1) The MARINER had just completed a voyage, was in a shipyard for her "routine maintenance", as was stated by her Chief Engineer, Mr. Davis, and upon completion of "routine maintenance" she was off on another voyage. No structural changes were made in her hull. (See Davis testimony, Tr. 369.)

(2) While a full crew was not aboard the vessel, the engineering crew — or a substantial portion thereof — and crewmen from the sister ship NAVIGATOR were aboard the vessel, participating in the repair and maintenance operation and *inspecting every two hours* the precise area where Allen was injured.

(3) While it is true the MARINER was in drydock,

she was in a *floating* drydock, being worked with floating cranes and a floating machine shop.

So, too, was the vessel in *Lawlor* in drydock, undergoing the same type of repairs as was the MARINER, i.e., her bottom, propellers, etc. In *Lawlor*, those repairs could have been accomplished only in drydock, as was the case herein.

(4) Here, libelant was not performing a task requiring the use of a highly specialized substance and equipment. He was doing a task traditionally done by seamen with equipment found on every vessel in the world, while working on a traditional piece of ship's equipment — a scaffold.

It is respectfully submitted that if it were to be held that Allen was not entitled to a seaworthy vessel, when surely the repairmen participating in the same operation, but "washing down engine room" or "removing accumulated sludge", would be so entitled, would be a "fortuitous result" condemned by this Honorable Court in *West, supra.*

In conclusion, it is respectfully submitted that the question of whether or not Allen was entitled to the benefit of the warranty of seaworthiness under the facts and circumstances as presented in this record has been clearly and positively designated by this Honorable Court *as a fact question*, to be disturbed only upon a showing of clear and manifest error. In this connection, Your Honors are referred again to *Roper v. United States*, 82 S. Ct. 5, 7 wherein it is stated:

> "In light of the above circumstances, we cannot say *as a matter of law* that the S. S. Harry Lane had been converted into a vessel in navigation, and that the findings of the trial court were clearly erroneous.

> *"Since we are unwilling to upset the trial court's factual determination that the S.S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. * * * "*
> (Italics Counsel's)

Counsel for petitioners rely on the cases of *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. denied 354 U.S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); and *Raidy v. United States*, 252 F. 2d 117 (4th Cir. 1958) cert. denied 356 U.S. 973, 78 S. Ct. 1136, 2 L. Ed. 2d 1147 (1958). It is respectfully submitted that the facts of these cases are clearly distinguishable from the case at bar.

In *Raidy*, as quoted on Page 7 of the petition for certiorari, the Court found that structural changes to the vessel were being made; the entire crew had been discharged long before the accident occurred; and the vessel had been "withdrawn from navigation for a long period."

In *Berryhill*, as quoted on Page 7 of the petition, the opinion shows that the vessel had been drydocked for a long period of time *on land*. In any event, it is respectfully submitted that the decision in Berryhill is unsound in view of the more recent opinions of this Court on the subject.

The decision in *Halecki* was predicated upon the highly specialized nature of the work being performed. There is nothing in the record of that case to show that the operation was "routine maintenance." In fact, the rationale of the *Halecki* decision is best stated by the quotation by this Court of Judge Lombard's dissenting opinion in the Court of Appeal, i.e., that the decedent "was not doing what any

crew member had ever done on this ship or anywhere else in the world as far as we are informed."

It is respectfully submitted that none of the cases relied on by petitioners are factually apposite to the case at bar.

CONCLUSION

It is respectfully submitted that upon this record there can be no clear and manifest error in the lower court's *findings of fact* that the MARINER had not been removed from navigation and that the warranty of seaworthiness extended to Allen. Under such circumstances, the petition for certiorari should be denied.

Respectfully submitted,

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Admitted August 31, 1960

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has been duly served on opposing counsel by depositing the same in the United States Mail, postage prepaid, addressed to them at their office.

Baton Rouge, Louisiana, this 23 day of December 1966.

s/ C. Paul Barker

C. PAUL BARKER